No. 82-419

Office - Supreme Court, U.S.
FILED
SEP 9 1982
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

OWENS-ILLINOIS, INC.,
Petitioner,

VS.

FLOYD WILLIAMS, JR., et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Ninth Circuit

MORGENSTEIN, LADD & JUBELIRER
MARVIN D. MORGENSTEIN
COUNSEL OF RECORD
JEFFREY R. WILLIAMS
255 California Street, Suite 800
San Francisco, California 94111
(415) 421-9320
R. JEFFREY BIXLER
OWENS-ILLINOIS, INC.
One SeaGate Plaza
Toledo, Ohio 43666
(419) 247-5000
PAUL, HASTINGS, JANOFSKY & WALKER
LLOYD SUTTER
230 Peachtree Street, N.W.
Suite 1100
Atlanta, Georgia 30303
(404) 588-9900

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-6500

QUESTIONS PRESENTED

1. May a Court of Appeals set aside findings of fact made by the District Court in an employment discrimination case where those findings (1) were not found to be clearly erroneous under Rule 52(a) of the Federal Rules of Civil Procedure, and (2) were not the result of legal errors made by the District Court?

2. Did the Court of Appeals err in retroactively applying the 300-day limitation period to this employment discrimination class action where the District Court had applied the 180-day limitation period followed in the Ninth Circuit at the time of the District Court's decision?

---

*The subsidiaries of petitioner Owens-Illinois, Inc. (other than wholly owned subsidiaries) are: Andover Controls Corporation; Health Group, Inc.; Insulation Research Corp.; National Petro Chemicals Corp.; Duradrum Corporation; OI/Schott Process Systems, Inc.; Sunmaster Corporation.

**In addition to Floyd Williams, Jr., the following named plaintiffs and/or intervenors were parties to the proceedings in the Court of Appeals: Alice Brice, Robert Harold, Aunita Jones, and Charlotte Harris.

TABLE OF CONTENTS

	Page
Questions presented	i
Opinions below	1
Jurisdiction	2
Statutes	2
Statement of the case	2
A. Introduction	2
B. Proceedings in District Court	4
C. Opinion of the Court of Appeals	9
Reasons for granting the writ	9
I	
The decision of the Court of Appeals conflicts with this Court's opinion in *Pullman-Standard v. Swint*	9
(a) The District Court's relevant labor market determination did not influence any findings of fact	11
(b) The District Court's ruling on the collective bargaining agreement did not influence any findings of fact	14
II	
The Court of Appeals decision on the statute of limitations violates the standards for retroactive application established by this Court in *Chevron Oil Co. v. Huson*	15
(a) The District Court followed the 180-day rule in effect in the Ninth Circuit at the time of the District Court's decision	16
(b) The 300-day rule of *Reed v. Lockheed Aircraft Corp.* should not be applied retroactively to the present case	18
Conclusion	20

TABLE OF AUTHORITIES

Cases

Page

Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24 (1978) 7

Chevron Oil Co. v. Huson, 404 U.S. 97 (1971) 4, 15, 16, 18, 19, 20

Dothard v. Rawlinson, 433 U.S. 321 (1977) 11, 12

Hazelwood School District v. United States, 433 U.S. 299 (1977) 7, 8, 11

Kelley v. Southern Pacific Co., 419 U.S. 318 (1974) 13

Kirk v. Rockwell International Corp., 578 F.2d 814 (9th Cir. 1978), *cert. denied* 439 U.S. 1004 (1978) 19

Lynn v. Western Gillette, Inc., 564 F.2d 1282 (9th Cir. 1977) 19

Northern Pipeline Construction Co. v. Marathon Pipe Line Co., ... U.S. ....., 50 U.S.L.W. 4892 (June 28, 1982) 20

Owens v. Commercial Union Fire Ins. Co., 211 F.2d 488 (4th Cir. 1954) 13

Pullman-Standard v. Swint, 456 U.S. ....., 50 U.S.L.W. 4425 (April 27, 1982) ..... passim

Reed v. Lockheed Aircraft Corp., 613 F.2d 757 (9th Cir. 1980) 17, 18, 19

Rodrigue v. Aetna Casualty & Surety Co., 395 U.S. 352 (1971) 18

Rodriguez v. Southern Pacific Transportation Co., 587 F.2d 980 (9th Cir. 1978) 17, 19

Teamsters v. United States, 431 U.S. 324 (1977) 7

Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981) 7

Wiltshire v. Standard Oil Co., 652 F.2d 837 (9th Cir. 1981) 19

Table of Authorities

Statutes

	Page
28 U.S.C. § 1254(1)	2
42 U.S.C.:	
§ 1981 (Civil Rights Act of 1866)	2
§ 2000e, *et seq.* (Title VII of the Civil Rights Act of 1964)	2
§ 2000e-2(h)	10, 14
§ 2000e-5(e)	2, 16
§ 2000e-5(f)(3)	2

Rules

Federal Rules of Civil Procedure:	
Rule 23(b)(2)	4
Rule 52	9, 10, 11, 13, 15
Rule 52(a)	i, 2, 3, 9, 10

No.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1982

OWENS-ILLINOIS, INC.,
Petitioner,

vs.

FLOYD WILLIAMS, JR., et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Ninth Circuit

Owens-Illinois, Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in the case of *Floyd Williams, Jr., et al. v. Owens-Illinois, Inc.*, entered on January 11, 1982, and amended on June 11, 1982.

OPINIONS BELOW

The opinion of the District Court is reported at 469 F. Supp. 70 (N.D. Cal. 1979) and is reprinted as Appendix A. The opinion of the Court of Appeals is reported at 665 F.2d 918 and is reprinted as Appendix B. The order amending the Court of Appeals' opinion and denying rehearing is reported at 28 FEP 1820 and is reprinted as Appendix C.

JURISDICTION

The Court of Appeals entered judgment on January 11, 1982. On June 11, 1982, the Court denied a petition for rehearing, but amended its opinion. This Court has jurisdiction to review the judgment below pursuant to 28 U.S.C. § 1254(1). The District Court had jurisdiction of this action under 42 U.S.C. § 2000e-5(f)(3).

STATUTES

The following relevant statutory provisions are reprinted at Appendix D:

1. Rule 52(a), Federal Rules of Civil Procedure;

2. Section 706(e) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(e).

STATEMENT OF THE CASE

A. INTRODUCTION

Respondents are three of the plaintiff-intervenors who brought this class action on behalf of themselves and other black and female employees or former employees at the Oakland, California plant of the petitioner, Owens-Illinois, Inc. ("the Company"). The suit alleged unlawful employment discrimination on the basis of race and sex under the Civil Rights Acts of 1866 and 1964, 42 U.S.C. § 1981 and 42 U.S.C. § 2000e, *et seq.*, respectfully. After an eight-week trial, the District Court entered extensive findings of fact with respect to both the individual claims[1] of discrimination and the claims of discrimination against the separate classes of black and female employees. (Appen-

---

[1]Judgments on the individual claims were not appealed by either party and are not pertinent to this petition.

dix ("App.") A at 2-11, 12-26, 27-70.) The District Court found no discrimination against the black or female classes except in the promotion or assignment of females to certain supervisory and managerial jobs. (App. A at 11-12, 26.) The respondents, on behalf of both classes appealed the judgments against the black and female classes.

The Court of Appeals affirmed in part, reversed in part and remanded. In doing so, the Court of Appeals completely ignored the District Court's extensive findings of fact and failed to apply to them the "clearly erroneous" standard of review, as required by Rule 52(a) of the Federal Rules of Civil Procedure and this Court's recent decision in *Pullman-Standard v. Swint*, 456 U.S. ....., 50 U.S.L.W. 4425 (April 27, 1982). The only clear reference to the findings of fact came in an amendment to the opinion which the Court issued in response to the Company's petition for rehearing. The Court simply indicated, without analysis or explanation, that the District Court must "redetermine" or "reconsider" all of its findings in light of certain errors identified in the Court of Appeals' original opinion. (App. C at 2-4.) Petitioner contends that these legal errors manifestly do not affect the validity of any factual finding and, therefore, the Court of Appeals' complete failure to address the findings directly conflicts with this Court's decision in *Pullman-Standard*, and completely undermines the mandate of Rule 52(a) that findings of fact shall not be set aside unless clearly erroneous.

In addition, the Court of Appeals extended the relevant limitations period by 120 days, holding that the District Court should have applied a limitations period of 300 days prior to the filing of the initial charge of discrimination, instead of the 180-day period applied by the District

Court. (App. B at 51-54, n. 2.) This retroactive application of the 300-day rule, which was adopted by the Ninth Circuit only after the decision of the District Court below, is in direct conflict with the standard for retroactive application of judicial decisions established by this Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971).

For the foregoing reasons, as more fully explained herein, a writ of certiorari should be issued to review the Court of Appeals' judgment.

B. PROCEEDINGS IN DISTRICT COURT

The complaint in this action alleged employment discrimination on the basis of race and sex in the areas of initial job assignments, promotions, terminations, wages, and treatment on the job. The District Court certified two separate employee classes under FRCP 23(b)(2): (1) all blacks employed at the Oakland plant after March 7, 1971; and (2) all women employed at the plant after March 23, 1974. The class included both hourly employees, whose terms and conditions of employment were controlled by eight separate and distinct collective bargaining agreements, and salaried employees, who were not covered by labor agreements. Separate issues were raised relating to the filling of job vacancies within the hourly workforce, promotions to salaried positions from hourly positions, and filling of job vacancies within the salaried workforce. The classes did not include applicants for employment.

After a lengthy trial in which some 80 witnesses testified and hundreds of documentary exhibits were introduced into evidence, the District Court entered separate findings of fact and conclusions of law as to each class. With respect to the class of black employees, the District Court

entered twenty specific findings of fact addressing the issues of job assignments, promotions, pay, and terminations, and concluded that the Company did not engage in any discrimination against black employees. The District Court specifically found that any differences in the treatment of black and white employees were based upon legitimate, non-discriminatory factors, such as qualifications, seniority, and available job vacancies. (App. A at 4, 6, 7.)

The District Court made some thirty-three separate findings of fact with respect to the class of female employees, largely paralleling the findings relating to the class of black employees. (App. A at 12-26.) The District Court acknowledged that in some areas of the plant few women were employed, but it found that this was due to the low rate of turnover, the lack of interested applicants, and the lack of qualifications. (App. A at 16, 18, 20-21.) In general, the District Court found that with the exception of supervisory and managerial jobs, jobs were awarded to females in a non-discriminatory manner, based upon qualifications, seniority, and applications.

The District Court did find that the Company unduly limited the access of females to supervisory and management jobs, and that it had a pattern or practice of promoting males to these positions instead of qualified females. The Court found that although there were qualified females available for these positions, the candidates were selected by male supervisors and managers who had never chosen a female for promotion into one of these jobs. (App. A at 23-26.)

Based upon the foregoing findings, the District Court entered conclusions of law holding that the class of black

employees had not been discriminated against and that the female class had been discriminated against only in promotion and assignment to supervisory and management positions. (App. A at 11-12, 26.) The respondents, on behalf of both classes, appealed these and certain other adverse determinations.

C. OPINION OF THE COURT OF APPEALS

The Court of Appeals reversed and remanded the judgments against both classes. Although the Court of Appeals separated the two classes in its analysis of the District Court opinion, it did not separately discuss the various issues of discrimination as the District Court had done in its findings of fact. And, the Court did not even mention the findings until it amended its original opinion in response to the Company's petition for rehearing.

With respect to the claims of race discrimination, the Court of Appeals first concluded that plaintiffs had presented sufficient evidence to establish a prima facie case of discrimination if the relevant labor market was either the one urged by plaintiffs or one of greater minority representation. The Court referred to the two job assignment aspects of plaintiffs' statistical study: that although blacks comprised 27% of the new hires, most of the blacks hired were service workers, and that only 11% of the craftsmen hired were black. (App. B at 17.)

The Court of Appeals then indicated that the Company failed to rebut the statistical case presented by the plaintiffs, finding that the Company's alternative studies did not negate the plaintiffs' evidence. (App. B at 17.) However, the Court of Appeals never mentioned the Company's non-statistical evidence or the District Court's finding of

fact that "[i]n the initial assignment of new hires, Owens-Illinois did not discriminate against Black employees. The evidence established that the assignment of new employees was based upon job openings and qualifications of the employee without regard to the race of the employee." (App. A at 4.) This finding of an absence of discrimination directly rebutted any prima facie case of discrimination. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24 (1978); *Hazelwood School District v. United States*, 433 U.S. 299 (1977); *Teamsters v. United States*, 431 U.S. 324 (1977).

The Court of Appeals next referred to what it characterized as the Company's primary defense: that many of the *wage* and *promotion* practices were mandated by collective bargaining agreements. (App. B at 18.) The trial court had ruled at a pre-trial conference that "any personnel activity, practice or procedure" compelled by a collective bargaining agreement would be deemed non-discriminatory and that the court would not alter or modify any provision of the agreements. This ruling was based upon the failure of plaintiffs to join as defendants the union parties to the eight labor agreements. The Court of Appeals held this ruling to be erroneous as a matter of law, indicating that an agreement permitting an employer to discriminate does not bar claims of unlawful conduct. (App. B at 18.)

The Court of Appeals then returned to the relevant labor market determination referred to by the District Court, and concluded that it was error to select Alameda County as the labor market from which it would be anticipated that the Oakland plant would hire employees. (App. B at 21.) Accordingly, the claims of the black class were

remanded to determine the appropriate definition of the relevant labor market.

The Court of Appeals never stated to what issue (*e.g.*, job assignments, promotions, or terminations) the labor market determination pertained. Since it cited this Court's decision in *Hazelwood School District v. United States*, 433 U.S. 299 (1977) (App. B at 24), the Court presumably considered the labor market pertinent to claims of hiring discrimination. Yet, this was not a hiring discrimination case. The class certifications both were limited to current or former *employees*. They did *not* include *applicants* for hire or others who desired employment with the Company, and the issues submitted to the jury did not include hiring discrimination. The issues in the case were limited to job assignments, promotions, pay, and terminations, none of which are influenced by the definition of the relevant labor market. In fact, throughout its decision, the Court of Appeals never describes the discrimination issues with any precision, choosing instead to lump together as identical issues questions concerning placements, promotions, pay and terminations, both as to employees covered by labor agreements and those not covered.

The Court of Appeals' approach to the sex discrimination issue paralleled its decision on the race claims. The Court reviewed plaintiffs' statistical evidence, which was addressed almost exclusively to the initial job assignment of females within the plant and to claimed disparities in wages between men and women. Ignoring again the District Court's factual findings on the job assignment issue, as well as findings on all other issues, the Court of Appeals reversed and remanded the entire sex discrimination case, directing redetermination of the relevant labor

market. (App. B at 36-37.) And, again, the Court of Appeals did not state what issues were related to the labor market determination, or on what issue a prima facie case could be established with a proper market determination. The Court never examined the District Court's extensive findings of fact to determine whether they would have rebutted any conceivable prima facie case.

In sum, the Court of Appeals' original opinion completely ignored the District Court's findings of fact on all issues. The Company sought rehearing, specifically urging the application of Rule 52(a) to the District Court's findings and, in a letter brief, calling attention to this Court's intervening decision in *Pullman-Standard v. Swint*. The Court of Appeals then amended its opinion, seizing upon the District Court's possible legal errors as justification for requiring redetermination of all findings of fact. The Court of Appeals never analyzed whether such errors could have actually influenced the findings of fact, choosing instead to maintain its blanket remand of the class judgments.

REASONS FOR GRANTING THE WRIT

I

THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THIS COURT'S OPINION IN PULLMAN-STANDARD v. SWINT.

In its original opinion, the Court of Appeals did not mention Rule 52, did not mention the "clearly erroneous" standard, and did not mention a single District Court finding of fact. The amendment does not bring the opinion into compliance with *Pullman-Standard v. Swint* and Rule 52 merely because the Court then suggests that its failure to

review the findings was occasioned by two District Court errors of law. The findings are totally unrelated to the legal determinations set aside by the Court of Appeals. To allow these errors to form the basis for a remand undermines the holding in *Pullman-Standard v. Swint* that findings of fact in employment discrimination actions must be accepted by an appellate court unless found to be clearly erroneous.

In *Pullman-Standard v. Swint*, the trial court found that a plant seniority system had been adopted and maintained for purposes wholly independent of any discriminatory intent, and thus was a "bona fide" seniority system under Section 703(h) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(h). The Court of Appeals for the Fifth Circuit reversed the district court's judgment based upon its disagreement with the lower court's determination as to the motivation of the parties who negotiated and adopted the seniority system, but the court of appeals did not expressly hold those findings to be clearly erroneous under Rule 52(a). This Court held that it was error for the court of appeals to reverse the lower court without determining that the findings of fact were clearly erroneous.

In the *Pullman-Standard* opinion, this Court noted that, while the court of appeals had correctly stated the controlling standard of Rule 52, it had done so only at the very end of its opinion, and "had not expressly referred to or applied Rule 52 in the course of disagreeing with the District Court's resolution of the factual issues . . . ." 50 U.S.L.W. at 4430. Rather, the court of appeals made an independent determination of the motivation of the parties in adopting the seniority system, which it characterized as

the "ultimate fact" in that case. In holding this approach to be error, this Court defined the mandate of Rule 52 as follows:

> "Rule 52 broadly requires that findings of fact not be set aside unless clearly erroneous. It does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a Court of Appeals to accept a district court's findings unless clearly erroneous. It does not divide facts into categories; in particular, it does not divide findings of fact into those that deal with 'ultimate' and those that deal with 'subsidiary' facts."
> 50 U.S.L.W. at 4429.

Under *Pullman-Standard*, the Court of Appeals here could not ignore the trial court's extensive findings of fact. The Court of Appeals' amendment purported to ground the remand upon possible legal errors, without demonstrating how the errors identified could have conceivably impacted those findings. On closer analysis, it becomes clear that the Court of Appeals simply ignored the findings of fact, the requirements of Rule 52, and *Pullman-Standard v. Swint*.

(a) The District Court's Relevant Labor Market Determination Did Not Influence Any Findings of Fact.

The Court of Appeals never explained the significance of the relevant labor market determination in the context of this case. The Court cited *Hazelwood School District v. United States*, 433 U.S. 299 (1977), and *Dothard v. Rawlinson*, 433 U.S. 321 (1977), in the course of discussing the labor market determination, but both these cases involved only claims of *hiring* discrimination. In *Hazelwood*, the government asserted that the defendant school district

was engaged in a "pattern or practice" of discrimination in hiring school teachers. A comparison of the percentage of minority teachers hired to the percentage available in the relevant labor market was an essential element of establishing a prima facie case of *hiring* discrimination. And *Dothard* involved a class of female *applicants* who claimed discrimination in the application of a uniform hiring requirement. Neither case indicated that external labor market analyses are appropriate for job assignment, promotion, pay and termination issues.

The trial court's findings of fact with respect to both the black and female classes do not purport to be based in any respect upon relevant labor market calculations. The findings address the existence of differences in treatment between black and white employees and between male and female employees. In some instances, no differences in treatment were found, such as in the wages paid to black and white salaried employees. In other situations, such as the assignment of females to hourly jobs, the findings acknowledge the absence or under-representation of women in certain positions.

The District Court then dealt with the Company's evidence that any differences in treatment were based on legitimate, non-discriminatory factors, finding that this evidence proved an absence of discrimination in all areas except one. Whether the relevant labor market is Alameda County or the City of Oakland will simply not change the fact that job assignments and promotions were based upon available job vacancies, qualifications and seniority, and not race or sex. Nor will the correct market analysis somehow change the findings that black salaried employees were paid amounts equal to white employees

for similar work and that no black employee was paid less than required by a bona fide job evaluation system.

The Court of Appeals' labor market discussion is even more perplexing when applied to the claims of sex discrimination. The District Court did not even purport to analyze the claims of the female class against any labor market. The reason, of course, was clear. *This case did not involve hiring discrimination issues.* In any event, a proper labor market determination will not change the existence of the legitimate, non-discriminatory factors for the absence of females in certain jobs. The proven lack of interest of females in certain undesirable jobs in the plant, the low rate of turnover in certain jobs, and the use of seniority and qualifications in awarding the jobs, are not dependent in any way on the definition of the labor market from which the Company could be expected to draw its employees.

Petitioner does not dispute the general rule that findings of fact should be redetermined where errors of law have manifestly influenced and controlled the findings. *Pullman-Standard v. Swint, supra; Kelley v. Southern Pacific Co.*, 419 U.S. 318 (1974); *Owens v. Commercial Union Fire Ins. Co.*, 211 F.2d 488 (4th Cir. 1954). But, as we have shown, the relevant labor market error purportedly made by the District Court did not influence any findings of fact. To permit the findings to be ignored without any analysis of the actual impact of the legal error completely undermines this Court's opinion in *Pullman-Standard v. Swint* and the standard of review under Rule 52.

(b) The District Court's Ruling on the Collective Bargaining Agreement Did Not Influence Any Findings of Fact.

In its original opinion, the Court of Appeals concluded that the District Court erred in its pretrial ruling that any personnel activity, practice or procedure compelled by a collective bargaining agreement would be deemed non-discriminatory. The obvious purpose of this ruling by the District Court was to avoid reformation of any of the eight labor agreements without the presence in the litigation of the labor union parties to these agreements. In its amendment to the opinion, the Court of Appeals acknowledged that § 703(h) of Title VII, 42 U.S.C. § 2000e-2(h), allows certain defenses for actions taken pursuant to a bona fide seniority system, but held that the District Court's ruling went beyond the scope of these defenses. The Court of Appeals, again without identifying any specific findings of fact, directed the District Court to redetermine any finding based upon this pre-trial ruling.

The District Court manifestly did not base any finding upon its labor agreement ruling. Initially, the labor agreements covered only the hourly workforce and, therefore, no finding relating to salaried positions could possibly have been influenced by the collective bargaining issues. And, as the Court of Appeals pointed out, the labor agreement issue related to wages and promotions and not to job assignments or terminations. Moreover, the District Court made a specific finding, based upon evidence presented at trial, that the labor agreements were not discriminatory. The Court found that the agreements did not adversely impact or affect members of the black class, and did not have the effect of denying any job, promotion, pay in-

crease, or any other term or condition of employment to any person because of race. Similar findings were made with regard to the sex discrimination issues. At no point in its findings did the District Court defer to its pretrial ruling on the labor agreements.

The effect of the Court of Appeals' remand is to establish a standard of review allowing the disregard of findings of fact whenever a trial court makes a legal error, irrespective of whether the error actually influences any finding. Such a standard is particularly burdensome in a case such as this where the findings are based upon consideration of some eight weeks of testimony and hundreds of documentary exhibits. The indiscriminate remand of all the District Court findings nullifies the purpose of Rule 52 and the import of *Pullman-Standard v. Swint*. The Court should grant certiorari to ensure the viability of the "clearly erroneous" standard by precisely defining the nature of the legal errors that may permit the disregard of factual findings. This case presents an excellent opportunity to address this issue.

II

THE COURT OF APPEALS DECISION ON THE STATUTE OF LIMITATIONS VIOLATES THE STANDARDS FOR RETROACTIVE APPLICATION ESTABLISHED BY THIS COURT IN CHEVRON OIL CO. v. HUSON.

The Court of Appeals held that the District Court erred in applying the 180-day statute of limitations in determining the class period. It held that the 300-day limit should have been applied. (App. B at 11, 51 n. 2.) However, the 300-

day rule was not adopted by the Ninth Circuit until after the decision of the District Court in this case. The decision of the District Court, at the time it was filed, followed the rule in the Ninth Circuit that the limitation period should be computed by subtracting 180 days from the date of the initial complaint filed with the EEOC. Under the decision of this Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), the subsequently-adopted 300-day rule of this Circuit should not have been applied retroactively, and the Court of Appeals' decision in this regard should be reversed.

(a) The District Court Followed the 180-Day Rule in Effect in the Ninth Circuit at the Time of the District Court's Decision.

The District Court opinion in this matter was filed on January 8, 1979. The District Court held that the statute of limitations used in determining the actionable class period should be computed by subtracting 180 days from the filing of the initial EEOC complaint for the respective black and female classes. In this holding, the District Court followed the clear language of § 706(e) of Title VII (42 U.S.C. § 2000e-5(e)), which states in relevant part:

> "A charge under this Section shall be filed within 180 days after the alleged unlawful employment practice occurred . . . except that in the case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice . . . such charge shall be filed by or on behalf of the person aggrieved within 300 days after the alleged unlawful employment practice occurred. . . ."

In *Rodriguez v. Southern Pacific Transportation Co.*, 587 F.2d 980 (9th Cir. 1978), the Ninth Circuit affirmed the District Court's application of the 180-day limitations period to a Title VII action. The Ninth Circuit held:

> "[I]n *Olson v. Rembrandt Printing Co.*, 511 F.2d 1228, 1231-33 (8th Cir. 1975), the only circuit court to address the issue had carefully explored the legislative history and policy of the statutes and had adopted the position urged in this case by Southern Pacific. *Accord, Wiltshire v. Standard Oil Co. of California*, 447 F.Supp. 756 (N.D. Cal. 1978). The district court concluded that the Eighth Circuit had stated the better view in *Olson* and that there was no reason to set aside judgment of dismissal. Because the district court's interpretation of the statutory jurisdictional requirements had substantial support at the time of the denial of the motion, we cannot say that it abused its discretion in declining to set aside its judgment of dismissal." 587 F.2d at 981.

Thus, not only did the District Court's application of the 180-day rule have "substantial support at the time of [its decision]", but it followed the clear authority of the Ninth Circuit in *Rodriguez v. Southern Pacific Transportation Co.*

In *Reed v. Lockheed Aircraft Corp.*, 613 F.2d 757, 759 (9th Cir. 1980), decided over a year after the District Court's opinion in this action, the Ninth Circuit adopted the 300-day rule. As will be demonstrated below, this rule should not be applied retroactively to this case.

(b) The 300-Day Rule of Reed v. Lockheed Aircraft Corp. Should Not Be Applied Retroactively to the Present Case.

In *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-107 (1971), this Court set forth the criteria to be considered in determining the retroactive effect of a judicial decision:

> 1. The decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed.
>
> 2. The court must consider the prior history of the rule in question, its purpose and effect, and whether retroactive application will further or retard its operation.
>
> 3. The court must weigh the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of non-retroactivity."

In *Chevron*, the Supreme Court held that its decision in *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1971), holding that state statutes of limitations apply to federal actions under the Outer Continental Shelf Lands Act, should not be applied retroactively. This Court noted that its decision in *Rodrigue* effectively overruled a long line of Court of Appeals decisions, which for over a year had represented the law of the case in the district court. For these reasons, the Supreme Court in *Chevron* held that its *Rodrigue* decision should not be applied retroactively.

When the *Chevron* factors are considered in the present case, it is clear that the 300-day rule of *Reed v. Lockheed*

Aircraft Corp. should not be applied retroactively to this case. The first criterion of *Chevron* is met in this case. At the time of the District Court opinion, the 180-day rule was well established in the Ninth Circuit. *Rodriguez v. Southern Pacific Transportation Co.*, 587 F.2d 980 (9th Cir. 1978); *see also Kirk v. Rockwell International Corp.*, 578 F.2d 814 (9th Cir. 1978), *cert. denied* 439 U.S. 1004 (1978); *Lynn v. Western Gillette, Inc.*, 564 F.2d 1282 (9th Cir. 1977). The 300-day rule had not been "clearly foreshadowed," as required by *Chevron*, but in fact was a complete reversal of previous Ninth Circuit law.

Second, the purpose of the 300-day rule will not be furthered by applying it retroactively to a case such as this. The rule, being one of limitations, is designed "to provide a predictable time period that strikes a fair balance between a claimant's right to a reasonable time within which to commence litigation, and a defendant's right not to be required to defend stale claims." *Wilshire v. Standard Oil Co.*, 652 F.2d 837, 841 (9th Cir. 1981). Not only will the purpose of this rule not be furthered by retroactive application, but its purpose would be thwarted if Owens-Illinois were now required to defend against a new set of charges occurring between eight and ten years ago. (The classes of black and female employees would be allowed to go back to November 7, 1970, and November 23, 1973, respectively, under the decision of the Court of Appeals.)

Finally, the equities of this case require that this decision not be applied retroactively. The inequity to be done by completely undoing an eight week trial, involving dozens of witnesses, hundreds of exhibits, and thousands of

pages of transcript, would far outweigh the benefits of retroactive application, which would simply add to the classes of employees certified below persons employed at the Owens-Illinois Oakland plant for an additional 120 days, none of whom ever even filed an EEOC charge complaining of discrimination.

Thus, the decision of the Court of Appeals to apply the 300-day rule retroactively conflicts with this Court's decision in *Chevron Oil v. Huson, supra,* which was most recently approved in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, ... U.S. ...., 50 U.S.L.W. 4892 (June 28, 1982). A writ of certiorari should be issued to bring the decision of the Court of Appeals into conformity with these decisions.

CONCLUSION

For the foregoing reasons, Owens-Illinois respectfully submits that a writ of certiorari should issue to review the decision of the Court of Appeals.

Dated: September 9, 1982

Respectfully submitted,

MORGENSTEIN, LADD & JUBELIRER
MARVIN D. MORGENSTEIN
COUNSEL OF RECORD
JEFFREY R. WILLIAMS

R. JEFFREY BIXLER

PAUL, HASTINGS, JANOFSKY & WALKER
LLOYD SUTTER
Attorneys for Petitioner
Owens-Illinois, Inc.